

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|--|---|--------------------|
| CESAR GARCIA |) | |
| Claimant |) | |
| VS. |) | |
| |) | |
| NATIONAL BEEF PACKING COMPANY |) | Docket No. 201,067 |
| Respondent |) | |
| AND |) | |
| |) | |
| WAUSAU UNDERWRITERS INSURANCE CO. |) | |
| AND LUMBERMEN'S UNDERWRITING ALLIANCE |) | |
| Insurance Carriers |) | |
| AND |) | |
| |) | |
| KANSAS WORKERS COMPENSATION FUND |) | |

ORDER

Respondent, its insurance carriers, and claimant requested review of the January 28, 1997, decision entered by Administrative Law Judge Kenneth S. Johnson. The Appeals Board heard oral argument on June 17, 1997.

APPEARANCES

Claimant appeared by his attorney, Lawrence M. Gurney of Wichita, Kansas. Respondent and its insurance carriers (hereinafter respondent) appeared by their attorney, Kerry E. McQueen of Liberal, Kansas. The Kansas Workers Compensation Fund (hereinafter Fund) appeared by its attorney, Douglas M. Crotty of Garden City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopts the stipulations listed in the January 28, 1997, decision. In addition, the Appeals Board considered the August 12, 1996, report by George G. Fluter, M.D., which was stipulated into evidence by the parties on September 11, 1996.

ISSUES

In its Application for Board Review and Docketing Statement, respondent raised the following issues:

- “1. The date that the Claimant suffered personal injury by accident arising out of and in the course of his employment.
- “2. The nature and extent of the Claimant’s disability.
- “3. The liability of the Kansas Workers Compensation Fund.
- “4. The amount of underpayment of temporary total disability benefits paid to the Claimant by the Respondent.”

Claimant, in his Application for Director’s Review/Board Review and Docketing Statement, raised the sole issue of nature and extent of disability.

In its brief, the Fund requested its costs and attorney fees be assessed against the respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds that the Award entered by the Administrative Law Judge should be modified to find a tasks loss of 50 percent and work disability of 75 percent, but should otherwise be affirmed.

The Appeals Board agrees with the finding of a work disability after claimant was placed on a long-term medical leave of absence. The Appeals Board also agrees with the finding by the Administrative Law Judge that the tasks loss opinion of Dr. Fluter is the most credible. However, the Appeals Board finds that the tasks loss opinion given by Dr. Fluter utilizing the tasks identified by Mr. Jerry Hardin should be averaged with Dr. Fluter’s opinion using the tasks list prepared by Ms. Karen Terrill. Accordingly, averaging the 70 percent tasks loss opinion with the 29 percent opinion, results in a finding that claimant has lost the ability to perform 50 percent of the work tasks that he performed during the 15-year

period preceding the accident. When averaged together with the 100 percent wage loss, claimant's work disability is found to be 75 percent. See K.S.A. 44-510e(a).

The Appeals Board finds claimant's date of accident should be March 6, 1996, his last day worked. The Court held in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) that in repetitive trauma cases there will be a bright line rule that the date of injury is the last date worked. In Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995) that bright line rule was modified in instances where the worker did not leave work due to the injury. In this case, claimant lost his job with respondent due to respondent's inability to accommodate the restrictions recommended by Dr. Flutter for the work-related injury. Accordingly, this case fits within the rationale of the Court's opinion in Berry. Claimant's last day of work for respondent should be treated as claimant's date of accident for purposes of this award.

As the date of accident in this case is found to be after July 1, 1994, the Fund has no liability for the award. See, Shain v. Boeing Military Airplanes, 22 Kan. App. 2d 913, 924 P.2d 1280 (1996). Nevertheless, respondent made a credible argument for an accident date of March 11, 1994. Had this earlier date of accident been adopted, the issue of Fund liability would have presented a closer question. The Fund's request that its costs and attorney fees be assessed against respondent is denied. The Fund shall be responsible for its own costs and fees.

An issue was raised concerning the amount of the underpayment of temporary total disability compensation due. The parties agreed with the finding by the Administrative Law Judge that claimant was entitled to 25.86 weeks of temporary total disability compensation. There was no issue raised concerning the claimant's average weekly wage or the weekly compensation rate. Accordingly, the findings and orders by the Administrative Law Judge concerning temporary total disability compensation are affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the decision by Administrative Law Judge Kenneth S. Johnson dated January 28, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Cesar Garcia, and against the respondent, National Beef Packing Company, and its insurance carriers, Wausau Underwriters Insurance Company and Lumbermen's Underwriting Alliance, for an accidental injury which occurred March 6, 1996, and based upon an average weekly wage of \$369.68 for 25.86 weeks of temporary total disability compensation at the rate of \$246.47 per week or \$6,373.71, followed by 303.11 weeks at the rate of \$246.47 per week

or \$74,707.52, for a 75% permanent partial general disability, making a total award of \$81,081.23.

As of June 30, 1997, there is due and owing claimant 25.86 weeks of temporary total disability compensation at the rate of \$246.47 per week or \$6,373.71, followed by 68.86 weeks of permanent partial compensation at the rate of \$246.47 per week in the sum of \$16,971.93 for a total of \$23,345.64, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$57,735.59 is to be paid for 234.25 weeks at the rate of \$246.47 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Kerry E. McQueen, Liberal, KS
Rebecca W. Crotty, Garden City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director